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NO. 90-1003

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA,

Petitioner,

v.

PETER SPOTTED HORSE, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK BARNETT
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record

John P. Guhin
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

EDITOR'S NOTE:

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INTRODUCTION AND STATEMENT OF CASE

The Respondent, in his Opposition to Petition for Writ of Certiorari, unaccountably asserts that the decision in this case affects no other state but South Dakota. In fact, the decision puts at issue not only South Dakota's pre-1968 assumption of partial jurisdiction, but also that of Arizona, Montana and Iowa. See, Petition for Writ of Certiorari, pages 16-17. In each of

these states, as in South Dakota, partial jurisdiction was assumed but the State did not simultaneously offer to take total jurisdiction.[1] Respondent offers no rebuttal to this analysis of the State, but only a mere denial.

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[1]South Dakota, in 1957, just four years before the 1961 legislation in question, offered to take total jurisdiction. The first condition was that the tribe consent, either actually or constructively to the assumption of jurisdiction. Each of the tribes involved in the companion case to this case, South Dakota v. Rosebud Sioux Tribe, No. 90-749 (Petition for Certiorari pending) refused to give consent. This fact makes the argument regarding the necessity for a simultaneous offer to the tribes to take total jurisdiction highly mechanistic; moreover, it is worth noting that none of the tribes in the Rosebud litigation evidenced any desire for total state jurisdiction. (The second condition of the 1957 legislation, relating to county arrangement for reimbursement with the federal government, see SDCL 1-1-14, was apparently not confronted.)

RESPONDENT HAS NOT STATED SUFFICIENT REASONS FOR DENYING THE WRIT

I

THE RESPONDENT MISCONSTRUES THE SITUATION ON THE ROADS FROM 1964 THROUGH THE PRESENT.

A. Effectiveness of law enforcement arrangements.

South Dakota assumed jurisdiction over roads through Indian Country in 1961. See 1961 S.D. Sess. Laws 464. In 1964, as set out in more detail in the State's Petition for Writ of Certiorari, the South Dakota Supreme Court determined that the State could not assume jurisdiction over highways only; the court held that if any jurisdiction was assumed under Pub.L. 280, 67 Stat. 588, codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1953), all jurisdiction must be assumed as a matter of federal law. See In re Hankins, 125 N.W.2d 839 (S.D. 1964). This decision was proven to be erroneous by the decision of this Court in Washington v.

Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). After Yakima was decided, the state began urging the courts to overturn the earlier state court decision so as to be consistent with Yakima. In State v. Onihan, 427 N.W.2d 865 (S.D. 1988) the state court did ultimately follow Yakima.

Respondent now argues to this Court that, from the period of 1964 to 1988, there was effective law enforcement on reservation highways despite the reliance on Hankins. This follows, in Respondent's argument, by virtue of a 1964 staff report of the South Dakota Legislative Research Council reciting the agreements which apparently then existed between the Tribal Councils, the United States Bureau of Indian Affairs, and the Attorney General. Respondent argues that because of these agreements highway law enforcement was effective from 1964 to 1988.

It was not. In the litigation in the companion case entitled, South Dakota v. Rosebud Sioux Tribe, No. 90-749, Petition for Certiorari filed November 5, 1990, South Dakota demonstrated that the fatality rate on reservation highways far exceeded that of the remainder of the state. The state-wide annual fatality rate for the ten-year period from 1977 through 1986 was 2.98 per 100 million miles traveled. In contrast, the 10-year annual fatality rate of the four reservation counties studied was 10.25 for Todd County on the Rosebud Reservation, 8.02 for Dewey County on the Cheyenne River Reservation, 7.02 for Ziebach County on the Cheyenne River Reservation and 17.01 for Shannon County on the Oglala Sioux Reservation. Affidavit of Pat Winters, dated January 6, 1988, in South Dakota v. Rosebud Sioux Tribe, No. 90-749, Petition for Certiorari filed November 5, 1990.

Standing Rock entered the Rosebud litigation at a late stage and the state did not develop any statistics relating to that reservation; it is telling that the Tribe did not do so. The claim of "effectiveness" of 1964-1988 law enforcement arrangements is not supported by the record.

B. Receptiveness to Agreements.

Moreover, it is disturbing that the Respondent should imply that South Dakota is hostile to agreements with Tribes. After the Eighth Circuit Court of Appeals rendered its opinion in Rosebud, South Dakota offered an agreement to the Rosebud plaintiffs.[2] The Standing Rock Sioux Tribe (and two other Tribes) declined to enter such an agreement.[3]

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[2]This incident arose on the Standing Rock Sioux Reservation.

[3]Because only one Tribe could agree with
(Footnote Continued)

C. Position of the United States.

Finally, the Respondent implies, through citation of the actions of the Bureau of Indian Affairs, that the United States favors his position. The contrary appears to be true. In Woehl v. United States, the United States, in its brief in the Court of Appeals for the Eighth Circuit, stated that South Dakota did assume jurisdiction over roads on the reservation, that its assumption of jurisdiction was immediately effective, and that it was "unaffected by subsequent South Dakota legislation, by the 1963 referendum, and by the Indian Civil Rights Act of 1968. It has never been removed by Congress." Brief of United States in Woehl v. United States, No. 87-5386SD, (8th Cir., filed

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(Footnote Continued)
the Rosebud settlement proposal, and three could not, the state determined to proceed with the Rosebud litigation.

Dec. 21, 1988), at 21. The United States said further that Yakima and Onihan left "no doubt that South Dakota's limited assumption of jurisdiction over criminal and civil matters arising on highways on Indian reservations was valid in 1961 and has remained so ever since." Id. at 21-22.[4]

II

RESPONDENT'S ARGUMENTS IN RELATION TO THE "RETROACTIVITY" LANGUAGE OF ROSEBUD AND IN RELATION TO THE PURPOSES OF PUB.L. 280 ARE NOT HELPFUL.

In Respondent's brief, pages 4-6, Respondent makes a concerted effort to direct this Court's attention away from the finding of the Eighth Circuit refusing to give retroactive application to Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).

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[4]This action was settled before argument and no circuit court opinion was issued in Woehl.

The State's reply, of course, is that the Eighth Circuit did, in fact unjustifiably refuse to give such application to Yakima. Moreover, the result of the refusal is that federal Pub.L. 280 law may be permanently different in Washington state (the locus of the Yakima decision) and in South Dakota (the locus of the present case). Under Respondent's analysis, partial jurisdiction is permissible, as a matter of federal Pub. L. 280 law, in Washington State but is not permissible, as a matter of federal Pub. L. 280 law, in South Dakota.

Respondent also urges that an alleged shift in national policy towards Indian Tribes should be decisive. The State responds that the language of Pub. L. 280 and not an amorphous, malleable "national policy" should control the meaning of Pub.L. 280 as enacted in 1953. Thus, South Dakota has urged that its assumption of jurisdiction

in 1961 pursuant to Pub. L. 280 met the concerns motivating the 1953 passage of Pub. L. 280, as outlined in Yakima, 439 U.S. at 498. Assumption of exclusive jurisdiction would reduce the economic burden of federal jurisdiction by eliminating it and by eliminating the very substantial federal subsidy (an estimated $850,000 annually for three of four Rosebud plaintiffs) for ineffective tribal highway law enforcement. Second, South Dakota's assumption of jurisdiction responded to the hiatus in law enforcement on reservations--a hiatus which is not merely perceived but is a cruel reality on the reservation highways as outlined above. Third, South Dakota's assumption of jurisdiction begins to assimilate Indians into the general population. Respondent has not argued that South Dakota's efforts do not satisfy this requirement of Yakima. Because South Dakota

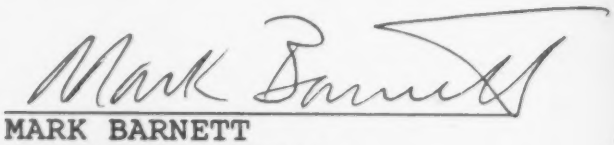
met the demands of Pub. L. 280 in 1961 it did assume jurisdiction over Indians on roads through Indian Country in South Dakota, despite any asserted shift in "national policy."

Finally, contrary to Respondent's assertion, the Indian Civil Rights Act of 1968 strengthens the State's claim to jurisdiction by explicitly preserving any "cession" of jurisdiction previously made. Act of April 11, 1968, 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)). Because South Dakota was a beneficiary of such a "cession" on July 1, 1961, and because South Dakota lacked the ability to surrender that cession at least until 1968, Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 886 (1986), South Dakota necessarily retained the 1961 "cession" of jurisdiction under the plain language of the 1968 Act.

CONCLUSION

The State of South Dakota respectfully requests that this Court grant a writ of certiorari to resolve the inconsistency between the Spotted Horse decision of the South Dakota Supreme Court and the decisions of this Court.

Respectfully submitted,



MARK BARNETT
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
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Deputy Attorney General
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